IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.520 OF 2006
WITH
CIVIL APPLICATION NO.728 OF 2006

S.S.Runwal. ..Appellant.

V/s.

The Somaiya Trust & Ors. ..Respondents.

Mr.Y.K.Tiwari i/b. M/s.K.P.Tiwari for appellant.

Mr.S.U.Kamdar with Mr. Raj Patel with Ms.Heena Chheda with Mr.Ameet Deshpande i/b.M/s.Harian & Co. for respondent Nos.1 & 2, 5 to 11.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 2, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Kamdar i/b.M/s.Harian & Co. waives notice for the respondent No.1,2, 5 to 11. Respondent Nos. 1 and 2 are original plaintiffs and the contesting Respondents. It is agreed that notice to other Respondents be dispensed with as their presence is not necessary in this appeal.

4. As short question is involved appeal is taken

up for final disposal forthwith by consent.

5. By this appeal from order appellant/ original defendant seeks to challenge the Judgment and order passed by the City Civil Court at Bombay dated 16th June, 2006 on Notice of Motion No.4033 of 2004 in L.C.Suit No.4668 of 2004. For the nature of order that I propose to pass, it is not necessary to advert to the factual matrix of the case extensively. Suffice it to observe that the respondent Nos.1 and 2 have filed suit before the City Civil Court for permanent injunction. The respondents/plaintiffs took out Notice of Motion No.4033 of 2004 for interim relief of injunction against the appellants/-defendants during the pendency of the suit. It is not in dispute that the appellant/defendant had also taken out Notice of Motion No.5265 of 2004 in the said suit for the following relief, having regard to the nature of controversy involved between the parties. The reliefs in the said notice of motion read thus:

> "(a) that pending hearing and final disposal of the above suit this Hon'ble Court be pleased to order and direct both the authorities i.e. District Inspector of Land Records, Sion and District Inspector of Land Records, Kurla Village or any such authority as may be found proper to visit the site jointly survey the property bearing Survey

> No.2 and 2/2 at Ayurvihar, Sion, verify the records and demarcate the boundary between the property of the Plaintiffs and the property of the Defendants pertaining to the suit plot and submit report to this Hon'ble Court;
>
> (b) That ad-interim reliefs in terms of prayer clause(a) above be granted;
>
> (c) That costs of the suit be provided for;
>
> (d) That such further and other reliefs as this Hon'ble Court may deem fit and proper, in the nature and circumstances of the case, be granted."

7. The grievance of the appellant/defendant is that if the relief in terms of prayer clause (a) was to be allowed, entire controversy between the parties can be put at rest. Instead of considering the Notice of Motion filed by the appellant in the first instance, the lower Court proceeded to decide the Notice of Motion filed by the respondents for interim injunction. I am in agreement with the submission of the appellant that the trial Court should have in the first place, passed appropriate order on the Notice of Motion taken out by the appellant being Notice of Motion No.5265 of 2004. If the reliefs in that motion were to be granted, the demarcation of the suit plot would be possible and in which case, injunction can be restricted against the appellant/defendant only to the extent of property

owned and possessed by the plaintiffs as per the demarcation done by the D.I.L.R.. Besides, the respondents/plaintiffs had expressed no objection, as noted in paragraph-4 of the reply affidavit filed before the trial court on behalf of the respondents/plaintiffs.

8. In this peculiar circumstances, in my opinion, the impugned Judgment and order making Notice of Motion No.4033 of 2004 absolute in terms of prayer clauses (a) and (c) will have to be set aside. Instead, it will have to be assumed that only ad-interim order in terms of the said prayer clauses of the said Notice of Motion is granted and that Notice of Motion stands restored to the file of the lower Court to be decided afresh on merits in the light of the observation made in this order. Further direction is issued to the trial Court to hear the Notice of Motion preferred by the appellant being Notice of Motion No.5265 of 2004 in the first instance. In the event relief claimed by the appellant/defendant in the said notice of motion was to be rejected for the objections available to the respondents/plaintiffs, in that case, trial Court will give reasonable time to the appellant/defendant to approach this court and take out proceeding either

in the pending First Appeal No.776 of 1991 or to question the correctness of the said decision independently by way of appropriate remedy, as may be available to the appellant. It is only on said proceeding finally decided, the trial Court may proceed with the hearing of the Notice of Motion No.4033 of 2004. It is made clear that the trial Court will decide all the issues in Notice of Motion No.5265 of 2004 on its own merits in accordance with the law.

9. It is further made clear that when occasion arises to decide the Notice of Motion No.4033 of 2004, the trial Court will pass appropriate order on the said notice of motion in accordance with the law uninfluenced by the observation made in the impugned Judgment or for that matter the present order.

10. Appeal as well as civil application disposed of on the above terms. No order as to costs.